

Oral Argument as an Opportunity to Deliberate With the Court

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I was fortunate enough to clerk for Judge David Hamilton on the Seventh Circuit Court of Appeals, and thus to observe his questioning at oral argument. I was struck by something that I noticed over time was a habit of his. Frequently he would ask advocates something to the effect of: "Here is what worries me about your position. How do you respond to that concern?"

I was also struck by how many advocates resisted this question rather than embracing it. They insisted, though not in so many words, of course, that the court was wrong to have any doubts about their position, or any sympathy for their opponent's. Presented with an opportunity to squarely address the court's concerns, they instead rejected the premise of the question.

I think that is a mistake. A judge who agrees with every point in your brief is not likely to have many questions for you at oral argument, and is likely to rule for your client regardless. The value of oral argument, it seems to me, is that it offers a chance to speak to the court's concerns about your position and its logic.

But effectively speaking to a court's most serious concerns is not something easily done on the spot. An important part of oral argument preparation is thus taking time to step out of the role of zealous advocate and imagine yourself in the role of impartial judge. If you were deciding this case, what would concern you most about your own position? What would seem most appealing about your opponent's position?

My sense is that the most effective oral advocates are those who are willing to deliberate with the judge about any difficult issues the case involves, rather than pretending those issues are simpler than they really are. Deliberating with a judge gives you the chance to convince her that your position is the one that best accommodates all of the court's concerns. The court may reach that conclusion on its own, without your help. But I believe the court is likelier to arrive at that favorable result when a forthright oral advocate has helped it find the way.

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